SERVED: December 28, 2007

NTSB Order No. EA-5347

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 21st day of December, 2007

ROBERT A. STURGELL, Acting Administrator, Federal Aviation Administration, Complainant, v. JOHN MICHAEL REX, Respondent.	)	Docket SE-17493

OPINION AND ORDER

Respondent, pro se,[1] has appealed from the oral initial decision of Administrative Law Judge William A. Pope, II, rendered at the conclusion of an evidentiary hearing held on

[1] Respondent was represented by counsel when he answered the complaint, but his counsel withdrew before the hearing, where respondent presented his own case.

January 9-10, 2007.[2] The law judge affirmed the Administrator's suspension order, which functions as the complaint in this case, and which suspended respondent's airline transport pilot certificate for 120 days. We deny respondent's appeal.

The Administrator alleged that respondent operated an aircraft in a careless or reckless manner in violation of 14 C.F.R. § 91.13(a). The law judge found that respondent started the engine of the aircraft with two individuals standing next to the cockpit door, began to taxi without ascertaining whether they were clear of the aircraft, and knocked them to the ground when the tail of the aircraft hit them.

Facts

Apalachicola Airport, near Apalachicola, Florida, is an uncontrolled, general aviation airport. The fixed base operation (FBO) on the airport premises is operated by Bill Ruic, who resides with his family on the airport near the FBO. Tr. at 20, 113, 126, 176. The airport is a public airport, but the Ruics leased the property surrounding the FBO, including the ramp. Tr. at 255. While the Ruics now collect tie-down and parking fees from customers who do not buy fuel from them, they did not do so at the time of this incident. Tr. at 159, 239. Our reading of the record leads us to conclude that the FBO

[2] A copy of the initial decision, an excerpt from the hearing transcript, is attached.

operators did not control the operating hours of the airport and did not have the authority to limit the use of the airport by the flying public, except as it relates to the use of their leased property and facilities.

On December 12, 1999, respondent was pilot-in-command of an instructional flight that landed after dark at Apalachicola. Tr. at 292, 321, 347; Exh. A-1 at 2. The airplane was carrying respondent, a student pilot (Don Brown), the student's wife (Leticia Brown), and respondent's girlfriend (Andrea Sims). Tr. at 292, 347. After parking the aircraft, the group left the airport to go to dinner. The airport gate was locked, but they were able to pull apart, and squeeze through, the chained fence. Tr. at 295, 322-23, 348. In a statement to the FAA shortly after the incident which is the subject of this case, respondent wrote: "We broke nothing, either law or lock!" Exh. A-1 at 1.

While respondent's party was at dinner, Mr. Ruic's wife, Patricia, and daughter, Jennifer, returned to the FBO, having closed it earlier that evening, to do some Christmas shopping on the Internet using the FBO office computer, and noticed an aircraft on the ramp that had not been there earlier. Tr. at 21, 127. A short time later, they heard respondent's party approach the gate, and saw them pry the gate apart and walk back through onto the airport grounds. Tr. at 21-22, 127-28. Jennifer Ruic called her dad, Bill, and the sheriff, and then

she and her mother drove to the ramp and pulled alongside respondent's aircraft. Tr. at 22. Respondent was talking on his cell phone as the others boarded. Tr. at 128, 297, 324, 349.

When respondent completed his call, Mrs. Ruic approached and asked what they were doing and how they had gotten through the gate. Tr. at 24-25, 129-30, 303, 329. Respondent got into the aircraft without answering. Tr. at 25, 129-30. Mrs. Ruic stood holding the open door of the aircraft, straddling the landing gear strut, as respondent directed Mr. Brown to start the engine. Tr. at 25-26, 130-31, 179, 352. The aircraft began to move forward, with Mrs. Ruic running alongside, and Jennifer running along trying to pull her mother away from the aircraft. Tr. at 25, 131, 144. Both Mrs. Ruic and Jennifer were struck and knocked to the ground by the horizontal stabilizer. Tr. at 25-26, 91, 131, 133, 180.

Background

On June 8, 2000, the Administrator issued respondent a Notice of Proposed Certificate Action (NOPCA). Administrator's Reply at 19. The record before us does not indicate why, but the Administrator did not issue an order of suspension for over 5 years, doing so on July 20, 2005. That order was filed as the complaint, and, on December 1, 2006, was amended to delete one factual allegation and one regulatory violation, and to reduce

the period of suspension from 300 to 120 days. As amended, the order of suspension alleged that:

> 1. ... you were and are now the holder of Airline Transport Pilot Certificate No. [redacted].
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> 2. On or about December 12, 1999 you were the pilot-in-command of N2168E, a Cessna 172, on an instrument instructional flight from Apalachicola, Florida to Panama City, Florida.
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> 3. After you boarded ... and before you started it, you were approached by an individual who requested to speak with you.
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> 4. The individual ... inquired as to how you got onto the airport and told you to wait until law enforcement officers arrived at the scene. During this time another individual arrived upon the scene.
>
> 5. You did not answer the questions, and instead ordered the pilot to start the aircraft despite the presence of the two women next to the aircraft.
>
> 6. After the aircraft started, on [sic] you began to taxi it for departure, despite the presence of the two women next to the aircraft.
>
> 7. As you did so, the aircraft struck the two women standing next to the aircraft, knocking them to the ground and causing them injury.
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> As a result, you violated the following section[s] of the Federal Aviation Regulations:
>
> 1. Section 91.13(a) which prohibits the operation of an aircraft in a careless or reckless manner so as to endanger the life or property of another.
>
> 2. [Paragraph 2 deleted.]

The Hearing

The Administrator presented the testimony of four witnesses: Patricia Ruic; Jennifer Ruic; FAA Aviation Safety Inspector Harvey Schwab; and the Ruics' son, Michael. The Administrator also produced three exhibits: a December 16, 1999 statement from respondent (Exh. A-1); a December 14, 1999 Franklin County Sheriff's Office Investigation Report prepared by Officer David Amison (Exh. A-2); and an excerpt from the Administrator's Sanction Guidance Table (Exh. A-3). The Ruics' testimony was generally consistent regarding the relevant facts, as described above. Mr. Schwab testified regarding his investigation of the incident, including his receipt of the statement from respondent (Exh. A-1).

Respondent presented the testimony of five witnesses: the three occupants of the aircraft; Paul Fast, a friend who witnessed a statement from a police officer regarding Patricia Ruic; and Brian Wilson, an expert witness on human performance and accident investigations. The testimonies of the occupants of the aircraft were generally consistent, and supported respondent's version of the events, focusing on their views that Mrs. Ruic approached respondent in a hostile and threatening manner, and that she grabbed the airplane door and respondent's arm in an attempt to delay the flight's departure. Tr. at 303-04, 308, 329-31, 334, 352-54, 360-66, 373-74. Respondent's

expert testified about "hindsight bias," a theory of a phenomenon in aircraft accident or incident investigations. According to Mr. Wilson, hindsight bias occurs when information that an investigator learns post-incident "tends to lead the investigator to a conclusion that the crews ... should have realized the ultimate outcome of their actions or should have realized the danger that their actions would impose upon the flight." Tr. at 386-87. Mr. Fast testified that a police officer asked respondent if he wanted Mrs. Ruic arrested for assault.[3] Tr. at 317.

At the conclusion of the hearing, the law judge found that respondent violated § 91.13(a) and that the 120-day suspension was appropriate. Initial Decision at 505-06. He found that both respondent and Mrs. Ruic could have better handled the situation, but found that respondent's actions made the situation worse and escalated it into the incident that resulted in the suspension of his airman certificate. Initial Decision at 495-96. We adopt as our own the law judge's findings of fact.

Appeal and Analysis

Respondent posits several arguments in his appeal brief, mostly amplifying arguments he made at the hearing. The

[3] Respondent claimed that Mrs. Ruic assaulted him by grabbing his arm as he sat in the aircraft.

Administrator opposes each of respondent's arguments.[4] We have carefully reviewed the transcript and the evidence of record in this case, and find no merit in respondent's arguments, whether or not they are specifically addressed in this opinion and order. Respondent appears to argue that the law judge deprived him of his right to due process by suppressing evidence. Law judges have broad discretion in conducting hearings.[5] We have held that where a respondent has had the opportunity to present and cross-examine witnesses at the administrative hearing, neither the law judge nor the Administrator has denied the respondent due process of law, as established by the Fifth Amendment.[6] Overall, respondent's due process argument is not persuasive.

In his appeal brief, as he did at the hearing, respondent contends that, based on the actions of Mrs. Ruic, he acted in

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[4] The Administrator replied to respondent's appeal in accordance with our Rules of Practice. Respondent then submitted a response to the Administrator's reply, which is not consistent with the Rules regarding appeal briefs. 49 C.F.R. § 821.48. Therefore, we decline to consider respondent's additional pleading.

[5] See Administrator v. Corredor, NTSB Order No. EA-5322 at 8-9 (2007).

[6] See Corredor, supra at 9 (2007); Administrator v. Nadal, NTSB Order No. EA-5308 at n.6 (2007); Administrator v. Raab, NTSB Order No. EA-5300 at 8-9 (2007).

self-defense under Florida law, and that his actions are excused by § 91.3,[7] which states:

> (a) The pilot in command of an aircraft is directly responsible for, and is the final authority as to, the operation of that aircraft.
>
> (b) In an in-flight emergency requiring immediate action, the pilot in command may deviate from any rule of this part to the extent required to meet that emergency.

Respondent argues, essentially, that his actions cannot be second-guessed by the Administrator or by the Board because his responsibility for the safety of his passengers required him to take action in light of a perceived threat to their safety. Id. Respondent says his "actions were acceptable ... in light of the assault, and very unusual hostile behavior of the assailant...." Id. at 18. The Administrator argues that, under respondent's theory, "Patricia Ruic's hostile behavior as an assailant created an emergency situation that provided Respondent with the authority to violate Section 91.13," and argues that Florida criminal law provisions regarding self-defense and use of force "bear no relevance in an administrative proceeding." Administrator's Reply at 15-16. We agree that Florida law does not control in this situation. However, even if it did, the law judge aptly addressed the issue:

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[7] See Respondent's Brief at 18-25.

> Under Florida law ... self-defense was a valid defense when the victim feared being assaulted with consequences of serious harm or death and when the victim was in a place where he had a right to be. The level of response must match the level of the threat not exceed it.
>
> [T]he victim had a duty to retreat if possible. ... Use of force is allowed only as last resort and if the victim uses excessive force he becomes the aggressor. Force becomes excessive when it exceeds that needed to assure one's safety or the safety of another.
>
> Here even assuming that Mrs. Ruic's action ... was a simple assault there [were] no reasonable grounds for the Respondent to fear serious harm or death. Patricia Ruic ... was a middle-age woman. She did nothing that would reasonably give the Respondent grounds to believe that she was armed or intended to seriously injure him or his passengers. ... She merely questioned how he got into the airport and told him the police had been called.

Initial Decision at 499-500. The law judge said respondent's "actions reflect a lack of knowledge of the law and a lack of good judgment." Initial Decision at 498.

We agree with the law judge that respondent did not face an emergency that gave him the authority, under § 91.3, to deviate from the prohibition contained in § 91.13 against careless or reckless operation of an aircraft. Further, even if such had been the case, respondent's actions in response were unreasonable under the circumstances. Mrs. Ruic's presence at the airport, and confrontation of respondent regarding how he got onto the premises, before the aircraft's

engine was started, did not reasonably involve a safety-of-flight issue.

Seemingly related to the issue of self-defense was the testimony of respondent's expert witness. Respondent offered Mr. Wilson's testimony for purposes of introducing "an entirely equal valid and opposite way of looking at the events of that night in light of what the pilot could have known only at that slice of time, that would have come to an equally valid and other conclusion than careless and reckless on that day, on that evening." Tr. at 384. The law judge correctly ruled that whether or not respondent's actions were justified was a matter of law that the law judge would decide without the expert witness's help, because the expert witness was not trained in the law. Tr. at 390.

Respondent launches multiple attacks against the law judge who, exercising extraordinary patience, allowed respondent to present his case and pursue lines of questioning and argument that were sometimes irrelevant. In his appeal brief, respondent, in some instances, grossly mischaracterizes the evidence and the law judge's actions. Respondent states that the law judge "recognized that Mrs. Ruic had not been truthful ... yet excused her behavior in a rather dismissive manner when he should have properly rendered a decision that she and her

daughter ... were actually attempting to commit perjury."

Respondent's Brief at 3. The law judge, however, actually said:

> Although, Mrs. Ruic testified she did not grasp the Respondent's arm ... the weight of the evidence shows otherwise.... [I]n what became a very heated exchange Mrs. Ruic's memory of exactly what she did is faulty. Jennifer Ruic's testimony, however, is very credible because the Respondent also had his hand on Mrs. Ruic trying to break her grasp.

Initial Decision at 496-97. As noted in the Administrator's Reply (at 10), the Board has long held that considerable deference is granted to the law judge's credibility determinations, "as he is in the best position to evaluate the demeanor of the witnesses."[8] As the Administrator points out, just because a respondent believes that a more probable explanation exists does not render a law judge's credibility determinations vulnerable to reversal on appeal.[9]

Further, the law judge "is free to reject or accept some or all of a witness' testimony and, unless inherently incredible, findings that are dependent on such credibility determinations will be sustained on appeal."[10] Here, although the law judge found that Mrs. Ruic was a credible witness, he found that other evidence in the case did not support a

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[8] See Administrator v. Smith, 5 NTSB 1560, 1563 (1986).

[9] Administrator's Reply at 11, citing Administrator v. Klock, NTSB Order No. EA-3045 (1989).

[10] Administrator v. Shepherd, 6 NTSB 1217 (1989).

finding that she did not grab respondent's arm, even if it was only to pry loose his grip on her arm.

Respondent argues that the law judge erred in not allowing evidence regarding the injuries (or lack thereof) to the two women. Respondent's Brief at 16. The law judge stated:

> I ruled ... that I wasn't going to go into the medical injuries.... I will let the witness, however, state what happened to her but it's not relevant to the proceeding because the issue ... is whether or not the Respondent operated the airplane carelessly and whether or not he created an endangerment to life or property by doing so. If somebody was injured, that's not really relevant....

Tr. at 27. Ironically, although the law judge was referring to a pre-hearing ruling, at this point in the hearing he is responding to an objection from respondent when the Administrator's counsel asked Jennifer Ruic what injuries she and her mother sustained. Tr. at 26-27. Respondent now argues, essentially, that evidence that there were no injuries demonstrated that the Ruics testified untruthfully. Respondent's Brief at 17-18. At any rate, respondent got that evidence before the law judge and into the record. Tr. at 339-40. We note, however, that injury is not required for a finding of reckless operation; neither is proof of actual danger necessary, as opposed to potential endangerment.[11]

[11] See Administrator v. Cannon and Winter, NTSB Order No. EA-4056 at 4 (1994); Ferguson v. NTSB, 678 F.2d 821, 829 (9th Cir. 1982); Haines v. Dept. of Transportation, 449 F.2d 1073, 1076

Law judges have broad discretion in overseeing discovery, conducting hearings, and admitting evidence. We have long held that determinations of relevance and admissibility of proffered evidence rest in the sound discretion of the law judge.[12]

Early in his appeal brief, respondent argues that the law judge "expressed evidence of his own prejudice against" his case and "demonstrated he was not qualified to hear the case, and should, properly have recused himself...." Respondent's Brief at 2. At the end of his appeal brief, respondent includes a "Motion for Decision of Board for the Disqualification of Judge Pope, per NTSB 821.35(c)." We find that respondent's contention, that the law judge "did not maintain professional standards that may reasonably be expected of a jurist," is without merit. We recognize that our Rules of Practice, at 49 C.F.R. § 821.35(c), provide, with regard to disqualification of law judges:

> A law judge shall withdraw from a proceeding if, at any time, he ... deems himself ... disqualified. If the law judge does not withdraw, and if an appeal from the law judge's initial decision is filed, the Board will, on motion of a party, determine whether the law

(..continued)
(D.C. Cir. 1971).

[12] Administrator v. Exousia, Inc., NTSB Order No. EA-5319 at n.9 (2007); Administrator v. Bennett, NTSB Order No. EA-5258 (2006) (citing Administrator v. Santana, NTSB Order No. EA-5152 at 3 (2005), and 49 C.F.R. § 821.35(b)).

> judge should have withdrawn and, if so, order appropriate relief.

A careful review of the transcript indicates that the law judge allowed respondent to question each witness sufficiently and received each relevant exhibit that respondent properly offered.

In general, respondent has not shown that the law judge prejudged the case or presided over the hearing in a biased manner. Respondent's motion is denied.

In his appeal, respondent renews his challenge on the issue of laches or stale complaint. The Administrator did not issue a suspension order until 5 years after the incident that gives rise to this case. Respondent first raised laches in the answer that he filed on September 6, 2005. He did not, however, renew that affirmative defense at the beginning of the hearing by moving for dismissal of the complaint, waiting instead until closing argument to discuss it. Tr. at 455. The law judge noted that the defense could not succeed unless respondent made a showing of actual prejudice to his defense as a result of the Administrator's delay in bringing the case, and the law judge, citing Administrator v. Brzoska, NTSB Order No. EA-4288 (1994), declined to dismiss the case on that basis. Tr. at 458. Respondent now raises the defense, and a statute of limitations argument, citing 28 U.S.C. § 2462, which reads, in pertinent part, "an action, suit or proceeding for the

enforcement of any ... penalty ... pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued...." See Respondent's Brief at 26. The Administrator, also citing Brzoska, argues that 28 U.S.C. § 2462 is not applicable because the suspension of a certificate is not a "penalty" within the meaning of the statute. Administrator's Reply at 19. Here, as in Brzoska, the Administrator "does not attempt to explain his five-year delay in initiating this enforcement action." We note that Brzoska was a medical application falsification case involving a revocation for lack of qualifications, not a suspension as here. We caution the Administrator, however, that an action such as a suspension of an airman certificate, as opposed to a revocation based on lack of qualifications, may be considered to be a "penalty" for purposes of 28 U.S.C. § 2462.[13]

We need not reach that issue, however, because, even if a suspension of an airman's certificate under the circumstances of this case is a "penalty" for the purposes of 28 U.S.C. § 2462, respondent's defense still fails. "Within the statute of limitations [referring to 28 U.S.C. § 2462], more than the

[13] See Coghlan v. NTSB, 470 F.3d 1300, 1306-08 (11th Cir. 2006) (holding a revocation was not such a penalty because it was remedial and not punitive, stressing that the action rested on lack of qualifications, exemplified by Coghlan's falsification of records, as opposed to punishment).

passing of time is required to set aside an agency action; we require a showing of prejudice."[14] Respondent knew about potential certificate action by the Administrator within the time limit prescribed in our Rules of Practice, known as the stale complaint rule. See 49 C.F.R. § 821.33. The Administrator issued a NOPCA on June 8, 2000, within 6 months of respondent's alleged violation. Further, the record is replete with information regarding both civil and criminal cases involving this incident and respondent and the Ruics, and the development of evidence for that litigation. Although respondent complains of a loss of "exculpatory information" (Respondent's Brief at 26), he makes no showing of what that information might be. Respondent had the opportunity, and availed himself of that opportunity on several occasions in the intervening years, to obtain depositions of the witnesses to the events of December 12, 1999. Our review of the record does not disclose, and respondent does not show, that he has suffered any prejudice in the defense of this case.

Our judgment in this regard should not be construed as condoning the Administrator's failure to proceed at a pace

[14] Williams v. Dept. of Transp., 781 F.2d 1573, n.8 (11th Cir. 1986) (noting 4-month delay was well within 5-year statute of limitations, court found that pilot holding Coast Guard master's license who was issued letter of warning did not demonstrate prejudice by any delay in notifying him of charges).

consistent with his determination that respondent presented a danger to safety in air transportation. "Although we do not sit in judgment on the Administrator's exercise of his [] powers, we feel constrained to comment that unexplained, lengthy delays in proceeding against an airman the Administrator eventually determines must be grounded [] are not likely either to advance the public interest in air safety or to inspire public confidence that an extraordinary power is being administered responsibly."[15]

Related to the laches argument, respondent argues that the law judge erred in admitting the Franklin County Sheriff's Office Investigation Report prepared by Officer David Amison (Exh. A-2). Respondent's Brief at 6. This is the one item of evidence to which respondent objected, partly due to the unavailability of this witness because of the passage of time. Tr. at 213-15, 283-84. The law judge stated his reasoning:

> ...I will admit the document ... because I think that there is enough evidence from [Mr. Schwab] as to where it came from and it's a reasonable inference that it was what it purported to be, a report prepared by the deputy sheriff and file[d] with the sheriff's office.
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> * * *

[15] Administrator v. Klock, 6 NTSB 1530 at n.9 (1989) (10-month delay between incident and NOPCA in case involving revocation for lack of qualifications).

> ...I think that there has been an adequate foundation established ... indicating that it is what it purports to be. ... I find no reason to believe that this was anything other than a report prepared by a law enforcement officer and filed with his office concerning an incident that he was involved in while on duty as a deputy sheriff.

Tr. at 284-85. Respondent has not shown that the law judge abused his discretion in exercising his control over the proceeding.[16] When respondent, later in the hearing, referred to a deposition of Deputy Amison, taken pursuant to the civil litigation referenced earlier, the law judge spoke to the prejudice resulting from not having that witness available, but reiterated his ruling on admissibility:

> [When] then Officer Amison gave the deposition he said ... he wrote this report, and he recognized his signature, it did reflect what he observed. So the report does qualify as past recollection recorded or possibly an official record that was prepared and kept by the police department.
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> * * *
>
> [W]hile there is prejudice I don't think that it is prejudice to the extent that it qualifies to dismiss the document on the grounds of laches because the officer was examined and did testify under oath that he prepared the document and that it was accurate at the time he prepared it.
>
> * * *
>
> I don't think that it qualifies under the case of [Brzoska] as actual prejudice warranting dismissing of the case as a result of delay.

[16] See Santana, supra at 3; 49 C.F.R. § 821.35(b).

Tr. at 457-58.

Conclusion

Upon consideration of the briefs of the parties and the entire record, the Board finds that safety in air commerce or air transportation and the public interest require affirmation of the law judge's decision.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;

2. The law judge's initial decision is affirmed; and

3. The 120-day suspension of respondent's airline transport pilot certificate shall begin 30 days after the service date indicated on this opinion and order.[17]

ROSENKER, Chairman, SUMWALT, Vice Chairman, and HERSMAN, HIGGINS, and CHEALANDER, Members of the Board, concurred in the above opinion and order.

[17] For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to 14 C.F.R. § 61.19(g).